BURKARD

Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: RJO Enterprises, Inc.

File: B-252232

Date: June 9, 1993

John C. Weldin, Esq., for the protester.
John A. Dodds, Esq., Department of the Air Force, for the agency.
David R. Kohler, Esq., and Audrey H. Liebross, Esq., for the Small Business Administration.
Richard P. Burkard, Esq., and Daniel I. Gordon, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that solicitation improperly allows Department of Defense (DOD) depots to submit offers under a solicitation which is otherwise set aside for small business concerns is denied where current DOD Appropriations Act grants the Secretary of Defense discretion to allow depots to compete with private firms for the requirement notwithstanding any other provision of law.

DECISION

RJO Enterprises, Inc. protests the terms of request for proposals (RFP) No. F42610-92-R-0132, issued by the Department of the Air Force for test program sets. RJO argues that only small businesses should be considered eligible to compete for the requirement and that the RFP improperly contains a clause allowing Department of Defense (DOD) depots to submit proposals. The protester requests that we recommend that the Air Force amend the RFP to permit only small business concerns to submit offers.

We deny the protest.

The RFP, issued January 5, 1993, requires offerors to design and deliver test program sets consisting of hardware, software, and documentation to be used in maintaining and testing shop-replaceable units. Shop-replaceable units, which are removable circuit cards and modules, are end items of the Minuteman weapon system. The test program sets have, in the past, been developed and produced almost exclusively by an Air Force depot, which is also currently performing that work.

The RFP states that the acquisition is set aside "100 percent" for small business concerns.[1] The RFP also provides that the acquisition is open to "U.S. Department of Defense sources." Amendment No. 2 to the RFP includes a clause citing two statutes authorizing DOD to conduct competitions between private firms and DOD depots for certain items.[2]

On February 5, 1993, prior to the closing date for receipt of proposals, RJO, a small business, filed this protest arguing that the RFP improperly allows organizations which are not small business concerns to submit offers. The agency did not extend the closing date and has received offers, including one from a DOD depot and one from RJO. Award has been withheld pending our decision. See 31 U.S.C. § 3553(c)(1) (1988).

RJO argues first that depots are prohibited from competing under the terms of the RFP. The protester asserts that the agency here issued the solicitation as a small business set-aside, and by definition, only eligible small business concerns can participate in a small business set-aside procurement. See Federal Acquisition Regulation (FAR) § 19.502-2. RJO states that since DOD depots are not small business concerns, they may not participate.

Although the protester characterizes the RFP as an unambiguous small business set-aside, RJO's argument fails to acknowledge that the RFP contains a clause explicitly allowing DOD entities to compete. The inclusion of that clause places potential offerors on notice that the agency would consider offers from DOD sources. Thus, it is clear

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[1]The RFP provides that standard industrial code 3769 is applicable to this procurement, so that the maximum number of employees allowed for a concern to be considered small is 1,000. See 13 C.F.R. § 121.601 (1992).

[2]Amendment No. 2 cites sections 314 and 1011 of the National Defense Authorization Act for Fiscal Year 1992 and 1993, Pub. 102-190, 105 Stat. 1290, 1337, 1457 (1991) and section 8120 of the DOD Appropriations Act for Fiscal Year 1992, Pub. 102-172, 105 Stat. 1150, 1204 (1991), as authority for allowing depots to compete for this requirement. While these sections were no longer in effect when the RFP was issued, the Air Force points out that the statutory authority for conducting a competition between private firms and depots has been renewed for fiscal year 1993, and the agency relies on the current statutory provisions to support its position in the protest.

from the face of the RFP that it is not "set aside for exclusive small business participation" as that language is used in FAR § 19.502-2.

We recognize that the RFP may appear ambiguous in that it states that the acquisition is set aside "100 percent" for small businesses and, at the same time, allows DOD depots, entities which are not small businesses, to compete. We find that the ambiguity can be resolved by reading the RFP as a whole and in a manner that gives effect to all its provisions. See Parsons Precision Prods., Inc., B-249940, Dec. 22, 1992, 92-2 CPD ¶ 431. Reading the RFP in this manner, we conclude that, under the RFP, private sector competition is limited to small businesses, but that those firms may face competition from DOD sources. Our interpretation is supported by the RFP clause explicitly allowing DOD sources to compete, which cites statutes authorizing competitions between DOD depots and private firms. Moreover, the filing of the protest itself demonstrates that the protester understood that the RFP contemplated a competition between depots and small businesses. In our view, the RFP, though inartfully drafted, is not ambiguous in its definition of the eligible field of competition.

RJO argues, however, that allowing DOD depots to compete for this requirement violates the Small Business Act and the regulations issued pursuant to that Act. It contends that the Air Force was required to set aside the competition for exclusive small business participation.

The Small Business Act codifies the congressional policy of ensuring that a fair proportion of the total purchases and contracts for property and services for the government in each industry category is placed with small business concerns. 15 U.S.C. § 644(a) (Supp. III 1991). Pursuant to the Act, Part 19 of the FAR instructs contracting agencies to set aside certain acquisitions for exclusive small business competition. FAR § 19.502-2 sets out what is referred to as the "rule of two":

> "The entire amount of an individual acquisition or class of acquisitions . . . shall be set aside for exclusive small business participation if the contracting officer determines that there is a reasonable expectation that (1) offers will be obtained from at least two responsible small business concerns offering the products of different small business concerns . . .; and (2) awards will be made at fair market prices."

The Air Force apparently concedes that the regulatory "rule of two" would normally require that the procurement be limited solely to small business concerns. Nevertheless, the agency contends that allowing depots to compete here is consistent with current public laws authorizing and defining public-private competitions. Specifically, it cites the DOD Appropriations Act for Fiscal Year 1993, § 9095, Pub. L. 102-396, 106 Stat. 1876, 1924 (1992) (Appropriations Act), which provides as follows:

> "Notwithstanding any other provision of law, during the current fiscal year, the Secretary of Defense may acquire the modification, depot maintenance and repair of aircraft, vehicles and vessels as well as the production of components and other Defense-related articles, through competition between Department of Defense depot maintenance activities and private firms. . . ."[3]

RJO responds that the Appropriations Act, as applied here, is in conflict with the Small Business Act and the FAR provisions implementing the Act. The protester contends that the Air Force has not shown that the Appropriations Act abrogates the Small Business Act and applicable FAR provisions. RJO maintains that the Appropriations Act can coexist with the Small Business Act if the agency allows depots to compete only where the agency contemplates an unrestricted procurement, that is, where both small and large private firms are eligible to submit offers.

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[3]In addition, as the Air Force points out, the National Defense Authorization Act for Fiscal Year 1993, § 381, Pub. L. 102-484, 106 Stat. 2315, 2392 (1992), provides authority for the competition between depots and private firms for fiscal year 1993. This Act extends through fiscal year 1993 the applicability of section 1425 of the National Defense Authorization Act for Fiscal Year 1991, Pub. L. 101-510, 104 Stat. 1485, 1684 (1990), which provided, in pertinent part, as follows:

> "[N]aval shipyards and Army, Navy, and Air Force aviation depots may, subject to the discretion of the Secretary of Defense, compete for contracts for the production of defense-related articles and contracts for the provision of services related to defense programs."

For brevity's sake, our decision refers only to the Appropriations Act as authority for allowing depots to compete with private firms.

The Small Business Administration (SBA) offers a similar view.[4] It contends that the "rule of two" set forth in the FAR requires exclusive small business participation and that therefore depots should not be permitted to compete where, as here, the "rule of two" has been met. It argues, essentially, that if Congress had intended to modify the regulatory "rule of two," it would have done so explicitly, not by providing the Secretary of Defense with discretion to disregard the rule for certain procurements during one fiscal year. In sum, SBA argues that, in the absence of explicit authority in the Appropriations Act to permit depots to participate in acquisitions which would otherwise be limited to small businesses, the Act should apply only to unrestricted procurements.

Based upon our review of the relevant statutes and regulations, as well as the arguments of the parties and SBA, we conclude that the RFP provision limiting competition to small businesses and DOD depots does not violate the Small Business Act or its implementing regulations.

The Appropriations Act explicitly grants the Secretary of Defense discretion to allow depots to compete with private firms, "notwithstanding any other provision of law." This plain language gives the agency discretion to conduct a competition between depots and private firms even where the regulatory "rule of two" would otherwise require that competition be limited to small business concerns. We see no other reasonable interpretation of the broad and unequivocal language of "notwithstanding" clause in the statute.[5] Neither SBA nor the protester has provided any support for the argument that the "notwithstanding" clause is only intended to override provisions of law prohibiting depots from competing on unrestricted procurements.[6] Such

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[4]Because of the potential adverse impact upon small businesses, we requested that SBA comment on the protest.

[5]The federal courts have interpreted similar "notwithstanding" language to supersede all other laws, stating that a "clearer statement is difficult to imagine." See, e.g., Liberty Maritime Corp. v. U.S, 928 F.2d 413 (D.C. Cir. 1991).

[6]Whether the Secretary of Defense should, as a matter of policy, limit public-private competitions to unrestricted procurements is not relevant to the question before us here, namely, whether the Appropriations Act authorizes the Secretary to allow depots to compete in acquisitions otherwise restricted to small businesses pursuant to the "rule of two." We find no basis in the statutory language

(continued...)

a reading is inconsistent with the plain language of the Appropriations Act and essentially renders the "notwithstanding" clause a nullity by exempting from its scope the regulations providing for small business set-asides.[7]

While we recognize that the Air Force's application of the Appropriations Act provision entails a modification of the regulatory "rule of two," we do not agree with SBA that such a modification "abrogate[s] the entire statutory and regulatory scheme applicable to small business set-asides." The Appropriations Act language plainly does not reduce DOD's obligation to comply with the "rule of two" for procurements where the Secretary of Defense does not allow depots to compete; and even for procurements (such as this one) where depots are permitted to compete, the "rule of two" continues to require that the competition with respect to private firms be limited to small businesses. Thus, we read the Appropriations Act as carving out a narrow and temporary exception to the broadly applicable requirements set forth in the FAR. See Illinois National Guard v. F.L.R.A., 854 F.2d 1396 (D.C. Cir. 1988).

Finally, SBA argues that it would be inequitable for small businesses to compete against "the full force of the United States government depot system." SBA asserts that there is an inherent inequity in pitting private businesses, especially small businesses, against organizations not concerned with profit. SBA argues also that contracting officers will be in a conflict of interest situation in that they would be required to evaluate an affiliated DOD agency. We point out that these concerns generally are not limited to small businesses; rather, they address the propriety of conducting public-private competitions in any form.

Essentially, SBA is asking us to review the fairness of the congressional policy of allowing public-private competitions, especially as the policy relates to small

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[6](...continued)
or the legislative history to conclude that the Appropriations Act requires the agency to limit depot participation to unrestricted procurements.

[7]In any event, the Appropriations Act language does not conflict with any provision of the Small Business Act. The only apparent conflict is with the "rule of two," which, as noted above, is set forth in regulation, not in the Small Business Act or any other statute.

businesses. We decline to do so.[8] Even if SBA is correct in asserting that the competition between depots and small businesses will not be on "a level playing field," there is nothing in this record which shows that the alleged unfairness of such a competition violates any statute or regulation. Consequently, we have no legal basis to object to the RFP provisions permitting DOD depots to compete. See Logistical Support, Inc., B-234621, May 24, 1989, 89-1 CPD ¶ 500.

The protest is denied.

Robert P. Murphy
for James F. Hinchman
General Counsel

[8]We note that the Appropriations Act includes a provision requiring that the Defense Contract Audit Agency ensure that source selection will be based on a cost comparability analysis of the competing public and private entities' offers. Pub. L. 102-396 § 9095, 106 Stat. 1876, 1924 (1992).